LIBRARY
SUPREME COURT, U. S.

FILED
DEC 29 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 72-1597

ULYSSES VERNON BEASLEY,
EMIDIO J. BASSETTI and
JOE W. JONES,

Petitioners,

v.

FOOD FAIR OF NORTH CAROLINA, INC.
and RAY F. MESSICK,

Respondents.

BRIEF FOR RESPONDENTS

RALPH M. STOCKTON, JR.,
J. ROBERT ELSTER
JAMES H. KELLY, JR.
610 Reynolds Building
Winston-Salem, N.C. 27101

Attorneys for Respondents

Of Counsel:

HUDSON, PETREE,
STOCKTON, STOCKTON,
& ROBINSON
610 Reynolds Building
Winston-Salem, N.C. 27101

ROBERT MOSS, ESQUIRE
1005 Union Bank Building
Richmond, Virginia 23219

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
QUESTION PRESENTED	2
STATEMENT OF CASE	2
SUMMARY OF DISCUSSION	4
DISCUSSION	5
CONCLUSION	26

TABLE OF AUTHORITIES

Cases:

Algoma Plywood Co. v. Wisconsin Board, 336 U.S. 301, 93 L.Ed. 691, 69 S.Ct. 584 (1949) 21

Amalgamated Ass'n of Street Ry. Employees v. Lockridge, 403 U.S. 274, 29 L.Ed. 473, 91 S.Ct. 1909 (1971) 22, 23, 24

Carpenter's District Council v. National Labor Relations Board, 274 F.2d 564 (D.C. Cir. 1959) 13, 14

Hanna Mining v. Marine Engineers, 382 U.S. 181, 15 L.Ed.2d 254, 86 S.Ct. 327 (1965) 6, 7, 18, 20

Higgins v. Cardinal Mfg. Co., 360 P2 456 (Kan. S.Ct. 1961) *Cert. Den.* 368 U.S. 829 21

National Labor Relations Board v. Big Three Welding Equipment Co., 359 F.2d 77 (5th Cir., 1966) 12

National Labor Relations Board v. Edward G. Budd Mfg. Co., 169 F.2d 571 (6th Cir. 1948), *cert. denied*, 335 U.S. 908, 93 L.Ed. 441, 69 S.Ct. 401 (1949) 12

National Labor Relations Board v. Fullerton Publishing Co., 203 F.2d 545 (9th Cir. 1969) 12

Page

National Labor Relations Board v. Inter-City Advertising Co., 190 F.2d 420 (4th Cir. 1951), *cert. denied*, 342 U.S. 908, 96 L.Ed. 679, 92 S.Ct. 301 (1952) 12

National Labor Relations Board v. Retail Clerks Ass'n, 211 F.2d 759 (9th Cir. 1954) 13, 14

Packard Motor Car Co. v. N.L.R.B., 330 U.S. 485, 91 L.Ed. 1040, 67 S.Ct. 789 (1947) 8

Retail Clerks v. Schermerkorn, 375 U.S. 96, 84 S.Ct. 219, 11 L.Ed.2d 179 (1963) 21

San Diego Building Trading Council v. Garmon, 359 U.S. 236, 3 L.Ed.2d 775, 79 S.Ct. 773 (1965) 6, 7

Teamsters' Local 20 v. Morton, 377 U.S. 252, 12 L.Ed.2d 280, 84 S.Ct. 1253 (1964) 15, 17

Statutes and Congressional Reports:

National Labor Relations Act:

1947 Taft-Hartley Amendments ..... passim
Section 7 ..... 6, 7, 15
Section 8 ..... 6, 7, 15, 18, 19
Section 14(a) 22
Section 14(b) 21, 22

(As Codified)

29 U.S.C. Section 152 ..... 6, 12

29 U.S.C. Section 157 6

29 U.S.C. Section 158 ..... 6, 18, 19

29 U.S.C. Section 153(b)(4)(B) 19

29 U.S.C. Section 164 ..... 6, 12, 21, 22

29 U.S.C. Section 185 5-6

29 U.S.C. Section 187 6

Page

North Carolina General Statutes (as codified)

Section 95-78 through 95-84 . . . . . 2, 4
Section 95-81 . . . . . 3, 4
Section 95-83 . . . . . 3, 4

House Report No. 245, 80th Congress, 1st Session . . . 8, 11, 18

Senate Report No. 105, 80th Congress, 1st Session 11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 72-1597

ULYSSES VERNON BEASLEY,
EMIDIO J. BASSETTI and
JOE W. JONES,

Petitioners,

v.

FOOD FAIR OF NORTH CAROLINA, INC.
and RAY F. MESSICK,

Respondents.

BRIEF FOR RESPONDENTS

OPINIONS BELOW

At the February 28, 1972, Session of the Forsyth County Superior Court, the Honorable Judge Robert M. Gambill entered summary judgment for the defendants Food Fair of North Carolina, Inc. and Ray F. Messick. The Court of Appeals of the State of North Carolina, as reported at 15 N.C. App. 323, 190 S.E.2d 33 (1972), reversed the decision of the Honorable Judge Robert M. Gambill. The Supreme Court of the State of North Carolina, as reported at 282 N.C. 530, 193 S.E.2d 911 (1973), reversed the decision of the Court of Appeals of

the State of North Carolina and ordered that judgment be entered affirming the decision of the Honorable Judge Robert M. Gambill.

QUESTION PRESENTED

Are the Courts of the State of North Carolina preempted or otherwise prevented by Federal law from adjudicating a claim brought by supervisors against their employer under the provisions of Sections 95-78 through 95-84 of the North Carolina General Statutes for an alleged discharge as a result of union membership and activity?

STATEMENT OF CASE

The petitioners herein were meat market managers for the respondent, Food Fair of North Carolina, Inc., who were discharged allegedly because they actively supported a union in its attempt to organize the company's rank and file employees. The petitioners filed charges with the National Labor Relations Board, claiming that their discharges were unlawful under the National Labor Relations Act, as amended. The Regional Director of the Board dismissed the charges because of "insufficient evidence of violation." He also determined that petitioners were supervisors and not "employees" and therefore not entitled to protection under the Act. The investigation of the Regional Director of the Board revealed that the petitioners independently and on their own authority scheduled both the regular hours and overtime hours of employees who worked under their direction, told the employees what work to do, exercised the authority to grant time off, and exercised their authority on their own to hire and fire meat market

employees as well as made recommendations for the hiring and firing of other employees, and at least in one instance effected a raise for an employee on their own authority (Appendix, pp. 11, 12). The petitioners appealed the Regional Director's decision, but this appeal was denied by the Board's General Council on the grounds that, as managers, they were supervisors within the meaning of the Act, and therefore not protected by that Act (Appendix, p. 13). The petitioners then filed this action in the Forsyth County Superior Court of the State of North Carolina, alleging that they were unlawfully discharged because of their active support of and membership in the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, in violation of Section 95-81 of the North Carolina General Statutes. The petitoners further requested monetary damages under Section 95-83 of the North Carolina General Statutes. The respondents then filed a motion to dismiss and motion for judgment on the pleadings, alleging, among other things, that supervisors were not included in the protection of the relevant state statutes, and that the Board had exclusive jurisdiction, thereby precluding the state court's consideration under North Carolina law of the facts and circumstances of this case.

The cause was heard before the Honorable Judge Robert M. Gambill during the February 21, 1972, Session of Civil Superior Court in Forsyth County, North Carolina. During the hearing all parties stipulated that each of the petitioners was, at all times complained of, a "supervisor" of Food Fair of North Carolina, Inc., and the trial court entered summary judgment for the respondents on February 28, 1972.

The Court of Appeals of the State of North Carolina reversed the trial court and held that state courts were

not preempted from regulating conduct between employers and supervisors.

The respondents then petitioned the Supreme Court of North Carolina for a Writ of Certiorari to the North Carolina Court of Appeals for review of its decision, and on September 14, 1972, that Petition was allowed.

The Supreme Court of North Carolina reversed the ruling of the Court of Appeals, holding that because the petitioners sought to invoke a remedy inconsistent with national labor policy, North Carolina state courts were precluded under the federal preemption doctrine from asserting subject matter jurisdiction over the case. The Supreme Court of North Carolina did not reach the issue of whether or not the petitioners, as supervisory personnel, came within the provisions of Sections 95-78, 95-81 and 95-83 of the North Carolina General Statutes and that issue has as yet not finally been determined by the North Carolina Supreme Court.

The petitioners then petitioned the Supreme Court of the United States for a Writ of Certiorari to the Supreme Court of North Carolina, and certiorari was granted on October 15, 1973.

SUMMARY OF DISCUSSION

The present case concerns whether or not a state can regulate the relationship between an employer and his supervisor in a labor relations context, and in particular whether an employer can freely fire his supervisor for union membership and activity.

The legislative history, statutory construction, and case law indicate that Congress intended that this activity, although "neither protected nor prohibited" be deemed privileged against state regulation. Congress, in establishing a national labor policy and attempting to preserve the

delicate balance between labor and management within the framework of that national policy, intended that an employer be able to freely fire his supervisors in order to insure their loyalty. If a state is allowed to award damages to a supervisor from an employer because the employer fired the supervisor for union membership and activity, this would seriously weaken the employer's position and destroy the balance intended by Congress, and force the employer one step closer to actually being forced to bargain with supervisors as though they were employees.

Practically, review by certiorari is not sufficient to meet the problem of safeguarding national labor policy which might be affected by the administration of state laws by state courts. Even if a rule of easy application is formulated for use by state courts, different results and problems must arise when the rule is applied by the various state courts utilizing separate procedural rules. More importantly, Congress sought to provide for comprehensive treatment of labor-management relations, and the subjection of relations with supervisors and employees to different state laws as well as federal laws would impede the resolution of problems involving employers situated in more than one state.

If preemption does not apply, then state courts should at least be limited to the application of a uniform federal substantive law consistent with national labor policy.

DISCUSSION

The factual situation under which the present case arose did not concern the usual exceptions to the pre-emptive doctrine involving violence imminently dangerous to the public interest, libel, the enforcement of collective bargaining agreements under Section 301 of the

Labor-Management Relations Act (29 U.S.C. 185), damage actions for unlawful secondary boycotts under Section 303 (29 U.S.C. 187), union security agreements, or the construction of contractual agreements and union internal affairs. This case does involve, however, the primary question of whether or not a state can regulate the relationship between an employer and his supervisor in a labor relations context. This question must be considered against the background of the Labor-Management Relations Act, which defines an "employer" to include any person acting as agent of the employer; which excludes "supervisor" from the definition of employee and protection of the Act (29 U.S.C. 152); and which specifically provides that no employer shall be compelled to deem supervisors as employees for the purpose of any law relating to collective bargaining (29 U.S.C. 164) (Appendix, pp. 18, 19). The respondents respectfully contend that Federal case law, congressional intent, national labor policy, and reasons of practicality dictate that the area of labor-management relations between an employer and his supervisors are not subject to state control and regulation.

Prior case law has clearly established that a state has neither the jurisdiction nor the authority to regulate conduct between labor and management where such conduct is protected by Section 7 (29 U.S.C.A. 157), or prohibited by Section 8 (29 U.S.C.A. 158) of the National Labor Relations Act, as amended. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 3 L.Ed.2d 775, 79 S.Ct. 773 (1959); *Hanna Mining v. Marine Engineers*, 382 U.S. 181, 15 L.Ed.2d 254, 86 S.Ct. 327 (1965). This Court has also clearly decided that whether a particular activity is protected by Section 7 or prohibited by Section 8 of the National Labor Relations

Act, as amended, must be left in the first instance to the National Labor Relations Board, at least in those instances where the question has not been clearly determined otherwise. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 3 L.Ed.2d 775, 79 S.Ct. 773 (1959); *Hanna Mining v. Marine Engineers*, 382 U.S. 181, 15 L.Ed.2d 254, 86 S.Ct. 327 (1965).

In the present case the petitioners did file charges with the National Labor Relations Board, which charges were dismissed because of insufficient evidence of violation and because the petitioners were supervisors and not employees, and therefore not entitled to the protection of the National Labor Relations Act. A subsequent appeal to the Board's General Council was also denied on the grounds that the petitioners were supervisors within the meaning of the Act, and therefore did not come within the protection of the National Labor Relations Act (See letter of NLRB General Council, Appendix, p. 13).

Although the present case does not come within the bounds of the more established "arguably" test utilized by the United States Supreme Court in *San Diego Unions v. Garmon*, supra, this Court has recognized an additional area not open to state jurisdiction. Thus, in *Hanna Mining v. Marine Engineers*, 382 U.S. 181, 15 L.Ed.2d 254, 86 S.Ct. 327 (1965), this Court stated the following guidelines:

> The ground rules for preemption in labor law, emerging from our *Garmon* decision, should first be briefly summarized: in general, a State may not regulate conduct arguably 'protected by §7, or prohibited by §8' of the National Labor Relations Act, see 359 U.S., at 244-246, *and the legislative purpose may further dictate that certain activity*

'neither protected nor prohibited' be deemed privileged against State regulation, cf. 359 U.S., at 245. (Emphasis added)

This second area of activity is clearly the area within which the present case lies. That is, activity neither protected nor prohibited which legislative purpose has dictated be privileged against state regulation.

Prior to the Taft-Hartley Amendments to the Act, the Board's policy was to exclude supervisory personnel from collective bargaining units which included employees subject to the supervision of those same supervisors. Apparently the reason for this policy was to prevent coercion or intimidation by the employees of a supervisor on the subject of collective bargaining and unions, and vice-versa. At the same time, the Board and courts held that "supervisors" did enjoy some consideration under the Act because Congress had not elected to exclude them from the definition of "employee." *Packard Motor Car Company v. NLRB*, 330 U.S. 485, 91 L.Ed. 1040, 67 S.Ct. 789 (1947). In his dissent in the *Packard* case, Mr. Justice Douglas emphasized that unless Congress amended the Act, the Board's processes could be used to unionize all of management, even vice-presidents, since they were not specifically excluded from the category of "employees."

Against this background the Taft-Hartley Amendments to the Act were passed. The legislative purpose of those amendments, as revealed by the legislative history, clearly indicates that Congress specifically intended to relieve employers from any compulsion under either Federal or state law to bargain with or be restricted in their dealings with supervisors, either in an individual or organized capacity. In the House Report No. 245, 80th Congress, 1st Session, beginning at page 14, the following remarks

clearly indicate Congress' purpose to establish such a national policy:

"The evidence before the committee shows clearly that unionizing supervisors under the Labor Act is inconsistent with the purpose of the act to increase output of goods that move in the stream of commerce, and thus to increase its flow. It is inconsistent with the policy of Congress to assure the workers freedom from domination or control by their supervisors in their organizing and bargaining activities. It is inconsistent with our policy to protect the rights of employers; they, as well as workers, are entitled to loyal representatives in the plants, but when the foremen unionize, even in a union that claims to be 'independent' of the union of the rank and file, they are subject to influence and control by the rank and file union, and, instead of their bossing the rank and file, the rank and file unions have done much of the actual organizing of foremen, even when the foremen's union professes to be 'independent.' Without any questions, this is why the unions seek to organize the foremen." Id. at 14.

* * * * *

"MANAGEMENT, LIKE LABOR, MUST HAVE FAITHFUL AGENTS.—If we are to produce goods competitively and in such large quantities that many can buy them at low cost, then, just as there are people on labor's side to say what workers want and have a right to expect, there must be in management and loyal to its persons not subject to influence or control of unions, not only to assign people to their work, to see that they keep at their work and do it well, to correct them when they are at fault, and to settle their complaints and grievances, but to determine how much work employees should do, what

pay they should receive for it, and to carry on the whole of labor relations." Id. at 16.

* * * * *

"So, by this bill, Congress makes clear once more what it tried to make clear when, in passing the act, it defined as an 'employer', not an 'employee', any person 'acting in the interest of the employer'; what it again made clear in taking up H.R. 2239 in 1943 and in dropping it when the Board decided the MARYLAND DRYDOCK case, and what, for a third time, it made clear last year in passing the CASE bill by a majority of about 2 to 1 and in barely falling short of enough votes to override the President's veto of this bill.

"The bill does not forbid anyone to organize. It does not forbid any employer to recognize a union of foremen. Employers who, in the past, have bargained collectively with supervisors may continue to do so. What the bill does is to say what the law always has said until the Labor Board, in the exercise of what it modestly calls its 'expertness', changed the law: *That no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom for any reason, he does not trust.* (Emphasis added)

"If management is to be free to manage American industry as in the past and to produce the goods on which depends our strength in war and our standard of living always, then CONGRESS MUST EXCLUDE FOREMEN FROM THE OPERATION OF THE LABOR ACT, NOT ONLY WHEN THEY ORGANIZE INTO UNIONS OF THE RANK AND FILE AND INTO UNIONS AFFILIATED WITH THOSE OF THE RANK AND FILE, BUT ALSO WHEN THEY ORGANIZE INTO UNIONS THAT CLAIM TO BE INDEPENDENT OF THE UNIONS

OF THE RANK AND FILE." Id. at 15. (Emphasis in original.)

* * * * *

"As under the present Act, the power of the Board under the amended Act in the matter of unfair labor practices is exclusive. This rule has necessitated a special provision . . . to give to the States a concurrent jurisdiction in respect to closed-shop and other union security arrangements. The rule of exclusive jurisdiction was developed many years ago by the Supreme Court in order to provide for uniformity in matters of national policy under the commerce clause. The Labor Act is an illustration of such a policy. IT CAN READILY BE SEEN THAT MISCHIEF MIGHT BE WROUGHT IF, FOR EXAMPLE, FOREMEN SHOULD BE SUBJECT TO STATE LAW AT THE SAME TIME THAT THE WORKERS THEY SUPERVISE ARE SUBJECT TO NATIONAL LAW. MOREOVER, THE BILL HEREWITH REPORTED VERY DEFINATELY STATES A NATIONAL POLICY IN RESPECT TO ORGANIZATION AND COLLECTIVE BARGAINING BY FOREMEN." House Report No. 245, 80th Congress, p. 40. (Emphasis added.)

The same theme is found in the Senate Committee Reports on the 1947 Taft-Hartley Amendment, and in particular Senate Report No. 105, 80th Congress, 1st Session, page 5:

"In other words, the bill does not prevent anyone from organizing nor does it prohibit any employer from recognizing a union of foremen. It merely relieves employers who are subject to the national Act from any compulsion by this National Board OR ANY LOCAL AGENCY to accord to the front line of management the anomalous status of employees." Id. at 5. (Emphasis added.)

With this judicial and legislative background in mind, Congress foresaw the increasing strength of organized labor and the serious national interest in maintaining the delicate balance of power between organized labor and the employer. In order to maintain that balance, Congress left to the employer the freedom to deal with his supervisor in a labor relations context by excluding the supervisor from the protections of the Act, and by further providing that although a supervisor was not prohibited from joining a union, the employer was not to be limited or regulated by either national or local law in his regulation or control of a supervisor. (29 U.S.C. 152, 164).

Since the 1947 amendments to the Act, the federal courts have consistently held that a supervisor is not protected under the Act from discharge due to union membership or activity. *NLRB v. Inter-City Advertising Company*, 190 F.2d 420 (4th Cir. 1951), *cert. den.*, 342 U.S. 908, 96 L.Ed. 679, 72 S.Ct. 301 (1952); *NLRB v. Fullerton Publishing Company*, 203 F.2d 545 (9th Cir. 1960); *NLRB v. Big Three Welding Equipment Company*, 359 F.2d 77 (5th Cir. 1966).

As noted by the Supreme Court of North Carolina in its decision in this case (Appendix to Petition for Writ of Certiorari, p. A1), the federal courts have gone further than simply holding that the National Labor Relations Act does not afford supervisory personnel protection. These courts have also clearly recognized the existence of the legislative purpose on the part of Congress to leave employers unfettered in dealing with union affiliation on the part of their supervisory personnel. Thus in the case of *NLRB v. Edward G. Budd Mfg. Company*, 169 F.2d 571 (6th Cir. 1948), *cert. den.*, 335 U.S. 908, 93 L.Ed. 441, 69 S.Ct. 401 (1949), one of the first cases

concerning supervisors after the 1947 amendments to the National Labor Relations Act, congressional intent was emphasized as follows:

> "We believe that it is clear that Congress intended by the enactment on the Labor Management Relations Act that employers be free in the future to discharge supervisors for joining a union, and to interfere with their union activities. . . ." 169 F.2d at p. 579.

Similarly, in *NLRB v. Retail Clerks Inter. Ass'n.*, 211 F:2d 759 (9th Cir. 1954) the legislative purpose was discussed at length, as follows:

> "A primary objective of §2(11) of the Act, to which reference is made in this paragraph of the decree, was to assure to the employer his right to procure the loyalty and efficiency of his supervisors and managers. The reports which accompanied the legislative bill which Congress enacted into the Labor Management Relations Act of 1947, made this abundantly clear. The reports were specific as to certain evils which the congressional committees thought they could avoid by excluding foremen and other supervisors from the operation of the Labor Act." 211 F.2d, at page 763.

Further, congressional intent was also considered in the case of *Carpenters District Council, etc. v. NLRB*, 274 F.2d 564 (D.C. Cir. 1959) as evidenced by the following excerpt:

> ". . . Congress was aware of the potential conflict between the obligations of foremen as representatives of their employers, on the one hand, and as union members, on the other. Section 2(3) evidences its intent to make the obligations to the employer paramount. That provision excepts foremen from the protection of the Act. Its purpose was

to give the employer a free hand to discharge foremen as a means of ensuring their undivided loyalty, in spite of any union obligations. . ." 274 F.2d, at page 566.

The petitioners were meat market managers who independently and on their own authority scheduled regular and overtime work hours for other employees in their market, determined what work each employee should do, exercised the authority to grant time off for these employees, hired and fired meat market employees, and effectuated pay raises. Thus, in the present case, the petitioners acted as agents for the employer in the day-to-day administration of the employer's policies and would have been the employer's logical choice for advice on situations involving collective bargaining with meat market employees and for the implementation of any collective bargaining agreements between the employer and a union of meat market employees. As noted by the Courts in *NLRB v. Retail Clerks Inter. Ass'n.*, 211 F.2d 759 (9th Cir. 1954), and *Carpenters District Council, etc. v. NLRB*, 274 F.2d 564 (D.C. Cir. 1959), Congress realized the importance of insuring the loyalty of the supervisor to the employer; and in the Taft-Hartley Amendments to the Act specifically excepted supervisors from the protection of the Act, and prohibited any other regulation of the employer's conduct towards supervisors in a collective bargaining context in order to give the employer a free hand to discharge supervisors in order to insure their loyalty.

The national labor policy obviously intended by Congress and expressed by the courts of allowing employers relative freedom in dealing with supervisory personnel in order to insure their loyalty is only a part of the balance of protection, prohibition, and laissez faire

with respect to union organization, collective bargaining, and labor disputes struck by Congress in the framework provided for in the National Labor Relations Act and the Labor Management Relations Act.

In the case of *Teamsters Local 20 v. Morton*, 377 U.S. 252, 12 L.Ed.2d 280, 84 S.Ct. 1253 (1964), the United States Supreme Court was faced with the question of whether or not a state was preempted from regulating labor management relations where those regulations would upset the congressional balance of protection, prohibition, and laissez faire, even though the activities to be regulated are neither protected nor prohibited by Sections 7 and 8 of the National Labor Relations Act. In that case Morton was engaged in hiring out trucks and drivers for use in highway construction, and Local 20 represented Morton's employees. During a strike over the terms of a new collective bargaining agreement, Local 20 persuaded the management of one Morton's customers to refrain from doing business with Morton during the strike. Since the customer was not threatened with any form of reprisal, the persuasion to boycott Morton was not an unfair labor practice, and Local 20 appears to have agreed that it was not protected by Section 7 of the National Labor Relations Act. However, the persuasion of customers was a violation of Ohio law, and a federal district court awarded damages for that violation. In reversing the decision of the lower federal court, the Supreme Court of the United States acknowledged that the activity was neither protected nor prohibited, but was nonetheless inimical to a national labor policy:

> "It is the respondent's contention, however, that since the petitioner union's peaceful conduct was neither arguably protected under §7 nor arguably prohibited under §8 of the National Labor Rela-

tions Act, as amended, the trial court was free to award damages on the basis of state law for injuries caused by this conduct. But even though it may be assumed that at least some of the secondary activity here involved was neither protected nor prohibited, it is still necessary to determine whether by enacting §303, 'Congess occupied this field and closed it to state regulation.' *Automobile Workers v. O'Brien*, 339 U.S. 454, 457, 94 L.Ed. 978, 983, 70 S.Ct. 781. The basic question, in other words, is whether 'in a case such as this, incompatible doctrines of local law must give way to principles of federal labor law.' *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 102 7 L.Ed.2d 593, 598, 82 S.Ct. 571. *The answer to that question ultimately depends upon whether the application of state law in this kind of case would operate to frustrate the purpose of the federal legislation.*" (Italics supplied) 377 U.S., at 258.

and further,

"This weapon of self-help, permitted by federal law, formed an integral part of the petitioner's effort to achieve its bargaining goals during negotiations with the respondent. Allowing its use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community. *Electrical Workers Local 761 v. Local Board*, 366 U.S. 667, 672. If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted [8(b)(4)], the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy. 'For a state to impinge on

> the area of labor combat designed to be free is quite as much an obstruction of legal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.' *Garner v. Teamsters Union*, 346 U.S. 485, 500. 377 U.S., at 259, 260.

The present case is indeed an even easier one for application of this doctrine than that of *Teamsters Local 20 v. Morton, supra*, in that the issue presented in the case at bar is one in which Congress has clearly evidenced its intent, as previously discussed. The relevant North Carolina statute (if interpreted to encompass supervisors) is an attempt at state regulation of collective bargaining between an employer and his supervisor, and especially the employer's right to fire his supervisor for union activities.[1] Certainly if this is not a direct attempt by the state to influence collective bargaining with the supervisor, and the respondents contend that it is, then the application of state law does operate at the very least to frustrate the purpose of federal legislation prohibiting local law requiring collective bargaining with supervisors. Surely if petitioners were employees rather than supervisors, precedent would dictate that state jurisdiction be preempted.

If the national labor policy is not found to preempt the application of state law in this case, then in North

---

[1] N.C.G.S. 95-78 through 95-84, Appendix pp. 16-18. The North Carolina Supreme Court decided that the pre-emption doctrine applied to the present case, and therefore reserved the right to determine if later necessary whether or not the statutes apply to supervisors. 282 N.C. 530, at p. 542 (Appendix to Petition for Writ of Certiorari, p. A18).

Carolina supervisors will be subject to state law and entitled to damages awarded by jury verdicts for violation of that law, while the workers they supervise will be subject to the regulations of the NLRB with its accompanying sanctions and reinstatement of wages. The result would be a lack of national and state uniformity, with each state imposing different sanctions and remedies, and create a serious imbalance in the relative strength of labor and management. As previously noted in the excerpt from House Report No. 245 of the 80th Congress, this was one of the situations which Congress sought to prevent by the 1947 Taft-Hartley amendments. Congress, in forming a balance between labor and management in the 1947 amendments, necessarily decided not only what course of tactics should be forbidden to the unions and to management, but also what methods of persuasion should be permitted by both employers and unions. This permissiveness with regard to employers included a national labor policy of allowing employers to deal directly with supervisors in order to insure their loyalty and maintain a balance between labor and management.

The only decision in which the United States Supreme Court has been faced with a case involving supervisors in a labor context is that of *Hanna Mining v. Marine Engineers*, 382 U.S. 181, 15 L.Ed. 2d 254, 86 S.Ct. 327 (1965). In *Hanna Mining* the plaintiff employers refused to bargain with the Marine Engineers Union until it was ascertained that the Union represented a majority of the engineers. In an obvious attempt at coercion, the Union then began picketing the plaintiffs' ships. The employers, charging a violation of Section 8 (29 U.S.C., §158) of the National Labor Relations Act, petitioned the National Labor Relations Board for representative elections. The

Board dismissed the petition on the grounds that the engineers, as "supervisors," were excluded from the definition of employees under the Act. The plaintiffs then sued in Wisconsin state court for an injunction under a Wisconsin law which increased the restrictions on supervisor organizing. The lower state court dismissed for a lack of jurisdiction, and the Supreme Court of Wisconsin affirmed on the grounds that the picketing was not only illegal under state law but also arguably violated Section 8 (b)(4)(B) and Section 8(b)(7) of the Act [29 U.S.C., §153(b)(4)(B) and §158(b)(7)]. The United States Supreme Court reversed in an eight member majority, deciding that Congress had made no considered decision generally to exclude state limitations on supervisory organizing. In answer to the Union's argument that state jurisdiction was preempted because of the congressional intent under Section 14(e) to adopt a laissez-faire attitude toward *supervisory organizing*, Mr. Justice Harlan, in writing for the majority, stated:

> This broad argument fails utterly in light of the legislative history, where the Committee reports reveal Congress' propelling intention was to relieve employers from any compulsion under the Act and under state law to countenance or bargain with any union or supervisory employees. Whether the legislatures fully realized that their method of achieving this result incidentally freed supervisors' unions from certain limitations under the newly enacted Section 8(b) is not wholly clear, but certainly Congress made no considered decision generally to exclude state limitations on supervisory organizing . . ." 328 U.S., at 189.

In the above passage the United States Supreme Court certainly sanctioned the same national labor policy as was

recognized by the Supreme Court of North Carolina in the instant case. However, in *Hanna Mining* the Wisconsin state law was only concerned with the regulation of supervisory organization and was both consistent and compatible with the national labor policy of allowing employers to deal freely with supervisors without regulation. Certainly Congress did not decide, nor was there any legislative history that Congress intended that unions should be free to coerce supervisors into joining unions and employers into recognizing supervisory unions. As noted by the United States Supreme Court in footnote 14, 382 U.S. 193, the conduct considered in *Hanna Mining* did not fall in that middle range impliedly withdrawn from state control, although not arguably protected by the Act. Indeed, the secondary pressure intended to coerce unwilling supervisors into accepting the representation of the union was one in which the state courts of Wisconsin had a valid and very real interest, and in which the necessity for federal pre-emption was at a minimum. If state injunctive relief had been preempted, the plaintiffs would have been compelled to bargain with the supervisory union. This in turn would have fustrated the national labor policy against such pressure on employers.

Unlike *Hanna Mining v. Marine Engineers*, 382 U.S. 181, 15 L.Ed. 2d 254, 86 S.Ct. 327 (1965), the present case does not involve a state statute which regulates union activity, but rather involves a state's attempt to regulate an employer's relationship with his supervisor,[2]

---

[2]N.C.G.S. 95-78 through 95-84, Appendix pp. 16-18. The North Carolina Supreme Court decided that the pre-emption

and to deny to the employer the advantage of maintaining control and retaining the loyalty of his supervisors through the employer's dismissal powers. By withdrawing the right of an employer to freely fire his supervisor for union activity and membership, these statutes actually withdraw the primary control of an employer over his supervisors and force the employer one step closer to actually having to bargain with supervisors as though they were employees, in violation of 29 U.S.C. 164. In short, the statutes involved in the case at bar are inconsistent with the national labor policy of allowing employers to insure the loyalty of their supervisors in order to maintain a balance in the organization of bargaining between labor and management, and are in direct conflict with the Taft-Hartley Amendments.

The petitioners have argued that by the enactment of §14(b) of the Labor Management Relations Act, [29 U.S.C. §164(b)], Congress ceded to the states jurisdiction over the application of state right to work laws. In support of this contention, the petitioners have cited *Higgins v. Cardinal Mfg. Co.*, 360 P.2d 456 (Kan. S.Ct. 1961) *cert. den.*, 368 U.S. 829; *Algoma Plywood Co. v. Wis. Board*, 336 U.S. 301, 93 L.Ed. 691, 69 S.Ct. 584, 23 L.R.R.M. 2402 (1949); *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 84 S.Ct. 219, 11 L.Ed. 2d 179, 54 L.R.R.M. 2612 (1963). However, §14(b) only provides that states may prohibit agreements requiring membership in a labor

---

doctrine applied to the present case, and therefore reserved the right to determine if necessary whether or not the statutes apply to supervisors. 282 N.C. 530, at p. 542 (Appendix to Petition for Writ of Certiorari, p. A18).

organization as a condition of employment. As has already been seen the present case does not involve a union-security agreement, nor does it involve the application of that portion of the statute prohibiting such an agreement. The cases cited by the petitioners certainly do involve application of §14(b) and contain decisions by this Court concerning the propriety of state prohibitions against union security agreements. However, while Congress very plainly made the decision to allow diverse rules concerning permissible union security agreements, §14(a) [29 U.S.C. 164(a)] which forbids compulsive bargaining with supervisors dispels any notion of Congressional intent to allow state jurisdiction over the relationship between an employer and his supervisor.

There are compelling practical reasons for this Court to hold that North Carolina is preempted from regulating the relationship between employers and supervisors. Such practical reasons were discussed at length by Mr. Justice Harlan in a different context in *Amalgamated Ass'n. of Street Ry. Employees v. Lockridge*, 403 U.S. 274, 29 L.Ed. 473, 91 S.Ct. 1909 (1971).

If state courts were allowed to administer their own laws restricting the conduct of an employer towards his supervisor, to include the hiring and firing of a supervisor, there must of necessity be some safeguard to insure compliance with the Taft-Hartley Amendments; and in particular, to prevent compulsive bargaining between an employer and supervisor. Unfortunately, review by certiorari is not sufficient to meet the problem, as noted by Justice Harlan in *Lockridge*, at 403 U.S., 289-290.

> Nor can we proceed on a case-by-case basis to determine whether each particular final juridical pronouncement does, or might reasonably be thought to, conflict in some relevant manner with

> federal labor policy. This Court is ill-equipped to play such a role and the federal system dictates that this problem be solved with a rule capable of relatively easy application, so that lower courts may largely police themselves in this regard.

Even were this Court to formulate a rule which is simple to apply for use in the regulation of an employer's relation with his supervisors, there would remain the diverse problems created by the application of this rule by different state courts unfamiliar with labor law and national labor law policy, utilizing their own local fact finding and law making procedure. As different procedural rules and unfamiliarity with national laws can easily produce the same diverse effects as separate state laws, this Court would again be faced with the problems of safeguarding national labor policy through the case-by-case certiorari procedure.

More importantly, the respondent employer in the present case is involved in interstate commerce. Congress very obviously sought to provide for comprehensive treatment of labor-management relations affecting several states. As Mr. Justice Harlan pointed out in *Lockridge* at 403 U.S., p. 286:

> [4.5] The course of events that eventuated in the enactment of a comprehensive national labor law, entrusted for its administration and development to a centralized, expert agency, as well as the very fact of that enactment itself, reveals that a primary factor in this development was the perceived incapacity of common-law courts and state legislatures, acting alone, to provide an informed and coherent basis for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces so as to further common good. . . .

The present situation involving supervisors participating in the union activity of rank and file employees deserves the application of uniform law even more than the situation involving a separate union of supervisors. The consequences of a union of employees and supervisors being subject to different regulations under state and federal law would inevitably exert a disruptive influence upon the administration and promulgation of labor relation policies of any employer engaged in interstate commerce and indeed must affect the very collective bargaining process which Congress sought to reserve to the National Labor Relations Board. Certainly the process of labor relations would be made immeasurably more difficult by the necessity of trying to formulate policies in such a way as to bargain with unions containing supervisors and employees under several state laws and federal substantive law. As ably noted by Mr. Justice Harlan in *Lockridge*, Congress sought to provide a uniformity through the Taft-Hartley Amendments and to provide uniform application of that law through the NLRB. The application of even simple guidelines concerning supervisory relations by state courts unfamiliar with national policy, utilizing diverse rules of procedure, while the NLRB retains jurisdiction over employees, would produce nothing less than chaos. Certainly the possibility of conflicting laws from state to state and within the same state between federal law applicable to employees and state law (or state courts and procedure) would impede the parties' willingness and ability to agree on terms resolving their dispute.

If this Court does decide that state courts are not preempted from controlling the relation between an employer and his supervisor, and the respondents contend that this Court should not so decide, then at the

very least the state courts should be limited to the application of uniform federal substantive law. Although this solution would not solve the problem of state courts with varying procedures applying an unfamiliar law, it would prevent the application of as many as fifty different state laws and the confusion which that would engender, the application of state law to supervisors and federal law to employees, and the denial to the employer of his primary method for retaining the loyalty of his supervisor and thus maintaining the power balance between the employer and the union.

CONCLUSION

Respondents respectfully submit that for the reasons discussed and cases cited herein the decision of the North Carolina Supreme Court that state courts are preempted from adjudicating a claim brought by supervisors against their employers for alleged discharge as a result of union membership should be sustained.

Respectfully submitted,

RALPH M. STOCKTON, JR.
J. ROBERT ELSTER
JAMES H. KELLY, JR.
610 Reynolds Building
Winston-Salem, N.C. 27101
(919) 725-2351

Attorneys for Respondents

Of Counsel:

HUDSON, PETREE, STOCKTON,
STOCKTON & ROBINSON
610 Reynolds Building
Winston-Salem, N.C. 27101
(919) 725-2351

ROBERT MOSS, ESQUIRE
1005 Union Bank Building
Richmond, Virginia 23219